



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Martin Warehousing & Distribution, Inc.

File: B-270651.2

Date: April 25, 1996

Dennis J. Hwang, Esq., Watanabe, Ing & Kawashima, for the protester.
Ronald R. Sakamoto, Esq., and David M. K. Lum, Esq., Char Sakamoto Ishii & Lum,
for Windward Moving & Storage Co., Inc., an intervenor.
Elizabeth Rivera Bagwell, Esq., and Anita LeBlanc, Esq., Department of the Navy,
for the agency.
Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protester's proposal was properly rejected as unacceptable where moving services solicitation contemplated award of primary and secondary contracts and specifically warned that a conditioned offer would not be eligible for award, and protester's proposal was conditioned to state that it was for primary award only.

DECISION

Martin Warehousing & Distribution, Inc. (MWD) protests the award of a contract to Windward Moving & Storage, Inc. (WMS) under request for proposals (RFP) No. N00604-95-R-0151, issued by the Fleet and Industrial Supply Center, Pearl Harbor, Hawaii, for household goods packing and crating services (Schedule III) on the island of Oahu.

We deny the protest.

BACKGROUND

The RFP contemplated the award of one or more indefinite delivery requirements contracts for a 1-year period, based on both technical and price evaluations. The schedule set forth estimated quantities for each line item, and offerors were required to provide unit and extended prices based on the estimates. The schedule provided the government's minimum and maximum daily requirements expressed in terms of "net hundred weight" (NCWT) units; offers had to be based on at least the 200 NCWT minimum daily guaranteed quantity and were permitted to be based on a daily quantity guarantee up to the government's 1,300 NCWT estimated maximum. Under the contracts awarded, the agency would place orders for services with the

firm awarded the primary contract up to its guaranteed maximum daily capacity. Orders for additional requirements then would be placed in a like manner with the next higher-priced, secondary contractor to the extent of its guaranteed maximum capacity, and so on, until the agency's total daily requirement is fulfilled.

The agency received nine offers from six offerors, including three from MWD, one of which was the lowest priced. However, only WMS' proposal (the third lowest) was found technically acceptable. The other eight proposals, including all three of MWD's, were found technically unacceptable for failure to provide required information regarding key personnel, quality assurance plan, and past performance. In addition, since MWD's low-priced proposal (the only one relevant here) stated that "This offer is for primary only," and the other two proposals were similarly limited to the secondary award, the agency found that the proposals contained unacceptable conditions that rendered them unacceptable. A single award thus was made to WMS.

ARGUMENT

MWD argues that the rejection of its low-priced proposal was improper because (1) the perceived deficiencies in its technical proposal were unjustified and could have been rectified through discussions, and (2) the "primary only" condition was permitted under the RFP. MWD concludes that it should have received award in light of its low price and higher (than WMS') guaranteed capacity.

ANALYSIS

The RFP contained the following provision at section L100B.2(5):

"OFFERORS SHALL NOT CONDITION THEIR PRICING PROPOSAL. ANY OFFEROR WHO DOES WILL NOT BE EVALUATED OR CONSIDERED FOR AWARD."

The Navy explains that section L100B.2(5) was included in the solicitation to prevent firms from offering only for the primary award because this practice previously had been permitted and had undercut the agency's ability to make the series of awards most beneficial to the government. For example, while a secondary award might ordinarily be made to the second low offeror, if the offer contained a primary only condition, such an award could not be made. Such conditions also create the possibility that firms might offer only on the primary contract (since, as the contract of first resort, it likely would result in the greatest volume for the contractor); this could result in limited offers for the secondary and tertiary awards, making it impossible for the agency to make reasonably priced secondary and tertiary awards.

We agree with the Navy that MWD impermissibly conditioned its offer.¹ The primary only language in MWD's proposal indisputably conditioned the proposal to permit its acceptance only for the primary award. This is clearly inconsistent with the restriction quoted above.

In a negotiated procurement, a proposal that fails to conform to material terms and conditions of the solicitation is unacceptable and normally may not form the basis for an award. CooperVision, Inc., B-231745, July 1, 1988, 88-2 CPD ¶ 3; Consolidated Bell, Inc., B-227894, Sept. 23, 1987, 87-2 CPD ¶ 292. A proposal which fails to satisfy all RFP requirements may be accepted, however, where waiving the deficiency would not competitively prejudice other offerors. Corporate Jets, Inc., B-246876.2, May 26, 1992, 92-1 CPD ¶ 471. Since MWD's proposal was low, and therefore presumably would have been in line for the primary award, it is clear that accepting its offer conditioned to primary award only would not, as a practical matter, have created the difficulties cited by the agency in determining the most advantageous award mix. However, accepting MWD's conditioned offer would be prejudicial to the other offerors which did not condition their proposals. The record indicates that prices for the primary contract alone would be lower than those for the secondary and tertiary contracts, since the primary contract likely would involve the greatest volume; as moving volume increases, the principle of economies of scale leads to lower unit prices. (This is illustrated by the pricing of MWD's own secondary proposals, which were 66 and 87 percent higher than its primary proposal price.) This analysis suggests that, had the other firms offered prices limited to the primary contract, their prices likely would have been reduced. This constitutes competitive prejudice; since MWD may have gained a competitive advantage by virtue of its disregarding the prohibition against conditioning offers, its failure to comply with the prohibition cannot be waived. See NR Vessel Corp., B-250925, Feb. 11, 1993, 93-1 CPD ¶ 128.

In reaching our conclusion, we have considered MWD's position that limiting its offer to primary award only is expressly allowed under Federal Acquisition Regulation § 52.215-16(d), "Contract Award (JUL 1990)–Alternate III (AUG 1991)," which was set forth in the RFP under section L as follows:

"The government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations. Unless otherwise provided in the Schedule, offers may be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the

¹We therefore do not reach the issue of whether the technical deficiencies in MWD's proposal warranted its rejection.

quantity offered, at the unit cost or prices offered, unless the offeror specifies otherwise in the offer."

MWD asserts that the primary only condition is consistent with the language of the provision allowing an offeror to specify that its unit price is applicable only for the given estimated quantity required and not for any lesser amount, since the secondary and tertiary contracts to be awarded likely would result in lower volume than the primary contract.² MWD's position is untenable. First, the primary only condition does not have the effect of limiting MWD's prices to a certain quantity; the RFP's estimated primary contract quantity for the principal line item is 150,000 NCWT; and the primary only condition did not make MWD's prices inapplicable if a lesser quantity of moving services were ordered under the primary contract. Moreover, as discussed above, the primary only condition had the effect of impermissibly limiting both MWD's competitive exposure and the agency's ability to make awards as contemplated under the RFP; thus, even if MWD were correct that the primary only condition effectively limited the applicability of its prices as contemplated by the quoted provision, it was inconsistent with the prohibition against conditioning offers, and thus rendered the proposal unacceptable.

The protest is denied.

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²In its comments on the agency report, MWD asserts for the first time its belief that WMS also indicated that its offer was primary only. This argument could have been, but was not, raised in the initial protest; it thus is untimely. See Ahern & Assocs., Inc., B-254907.4, Mar. 31, 1994, 94-1 CPD ¶ 236. In any case, we have reviewed WMS' offer, and it was not conditioned.